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No. 08-1436

In The
Supreme Court of the United States

GERALD K. SMITH, as the Litigation Trustee of the Farmland Dairies LLC Litigation Trust; G. PETER PAPPAS, as the Plan Administrator of the Plan of Liquidation of Parmalat-USA Corporation,
Petitioners,

v.

Bank of America Corporation, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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Plaintiffs/Petitioners Farmland and Parmalat-USA respectfully submit this reply brief in further support of their petition for certiorari. Defendants/Respondents do not dispute that both questions raised in this petition relate to broadly applicable procedural rules over which there is substantial disagreement in the federal courts. Instead, Defendants argue only – and incorrectly – that Plaintiffs failed to preserve below the issues now presented to this Court.[1]

I. PLAINTIFFS/PETITIONERS' FIRST QUESTION PRESENTED REGARDING THE PROPER PLEADING STANDARD UNDER RULE 9(B) IS APPROPRIATE FOR CONSIDERATION UNDER A GRANT OF CERTIORARI.

A. The Second Circuit Relied Upon an Incorrect Rule 9(b) Standard.

Defendants argue that certiorari on Plaintiffs' first question presented regarding the proper Rule 9(b) standard would be inappropriate because the court of appeals did not rely on Rule 9(b) and instead based its decision on Rule 8(a). Defendants read far too much into the court of appeals' perfunctory, unpublished, unsigned summary order. Though the court of appeals' summary order does not quote the Rule 9(b) standard, *see* Pet. App. 3a-5a, the Rule 9(b) standard

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[1] Defendants suggest that Plaintiffs do not seek this Court's review with respect to any defendant other than Deloitte-USA. In fact, Plaintiffs argue that application of the incorrect pleading standard caused the district court to disregard Plaintiffs' allegations about Deloitte-Italy's knowledge of and participation in the fraud. *See* Pet. 24.

is cited and applied extensively in the district court's opinion, *see id.* at 40a-41a, 59a-60a, 63a, 65a-68a, 73a-75a, which the court of appeals affirmed in its entirety. In fact, the *only* opinion that applies *any* pleading standard is the district court's opinion. The court of appeals' opinion simply adopts the district court's analysis wholesale. *See id.* at 4a ("We agree with Judge Kaplan ...."); *id.* ("The District Court correctly concluded ...."); *id.* ("We agree that '[a]s plaintiffs have failed adequately to allege Deloitte USA's knowledge that Parmalat insiders were committing fraud, they have failed to allege that it was reasonably foreseeable to Deloiite USA that its conduct eventually would result in the looting of Farmland's assets.'" (quoting *In re Parmalat Secs. Litig.*, 501 F. Supp. 2d 560, 591 (S.D.N.Y. 2007))). The court of appeals concluded by affirming the district court's judgments "*substantially for the reasons stated by Judge Kaplan in his careful and thoughtful opinion* of August 8, 2007." *Id.* at 5a (emphasis added). Certainly, the court of appeals did not express any disagreement with or qualification of the district court's analysis. It would "strain at technicalities to conclude" that the Rule 9(b) issue is not properly before this Court because the Second Circuit's opinion did not recite some magic language. *Terminiello v. City of Chicago*, 337 U.S. 1, 6 (1949); *see also, New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) ("[I]t is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.").

Even if this Court could find some independent analysis in the court of appeals' summary order, the absence of a quotation of the "strong inference" standard of Rule 9(b) does not mean that the court of

appeals did not rely on it. The Second Circuit has long stated that "Rule 9(b) ... must be read together with rule 8(a) which requires only a 'short and plain statement' of the claims for relief." *Ouaknine v. MacFarlane*, 897 F.2d 75, 79 (2d Cir. 1990). Thus, the quoted language interpreting Rule 8(a) does not mean that its decision was not also based on Rule 9(b). Indeed, the court of appeals' opinion cited both Rule 8(a) and Rule 9(b) exactly once! *See* Pet. App. 3a.

Finally, even if it could be inferred that the court of appeals' order was not based on Rule 9(b), certiorari is still appropriate. A court of appeals need not squarely address a question in order for this Court to exercise its certiorari jurisdiction. It is sufficient that the court of appeals affirmed the district court's error. In *Stevens v. Dep't of Treasury*, 500 U.S. 1, 7 (1991), this Court granted certiorari where the court of appeals in an unpublished per curiam opinion, as here, merely "implie[d], even if it d[id] not say so directly, that the court [of appeals] was not in disagreement with the District Court's ... error." Thus, Plaintiffs' discussion in their petition of the district court's Rule 9(b) analysis is germane, and certiorari is appropriate to consider the question.

B. Grant of Certiorari Is Appropriate in Light of *Ashcroft v. Iqbal*.

Defendants suggest that this Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009),[2] controls this case with respect to the first question

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[2] *Iqbal* was decided on the same date Plaintiffs submitted their petition for certiorari.

presented and certiorari should be denied to allow the lower courts an opportunity to "respond to" *Iqbal* and "re-evaluate" their precedent in light of that decision. Opp. 7 & n.6. Contrary to Defendants' suggestion, *Iqbal* reinforces, rather than undermines, the importance of a grant of certiorari in this case.

If *Iqbal* controls, then this Court should grant certiorari to clarify that the "strong inference" standard is inconsistent with that decision. Defendants argue that *Iqbal* implicitly overrules precedent from those courts of appeals that have held that Rule 9(b) does not require any averment of fact supporting an inference of intent or knowledge. Opp. 7 & n.6; *cf.* Pet. 12-14, 20-22. If that is true, it is equally true that *Iqbal* implicitly overrules the Second Circuit's interpretation of Rule 9(b), which requires the pleading of facts (with particularity) giving rise to a "strong inference" of the requisite state of mind. *See* Pet. 11 & n.3.

This Court held in *Iqbal* that an allegation of state of mind is subject to the standard of Rule 8(a), which requires no more than an averment of fact sufficient to support a "*plausible*" (or "*reasonable*") inference. 129 S. Ct. at 1949 (2009) (emphasis added). "Plausible" means "superficially worthy of belief" or "being such as may be accepted as real," *Webster's Third New Int'l Dictionary* 1736 (1981),[3] a significantly lower threshold than "strong," which this Court has defined as "*more than merely plausible or reasonable* – it must be cogent and at least as compelling as any opposing inference of

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[3] Another dictionary defines "plausible" as "seeming reasonable or probable." *New Oxford Am. Dictionary* 1301 (2d ed. 2005).

nonfraudulent intent," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (emphasis added). The "plausible inference" pleading standard of *Iqbal* and the "strong inference" standard of the Second Circuit thus cannot be reconciled. Indeed, Defendants' opposition brief does not even attempt to argue that the Second Circuit standard is consistent with *Iqbal*.

Moreover, this Court specifically noted in *Iqbal* that "Rule 9 ... excuses a party from pleading ... intent under an elevated pleading standard." 129 S. Ct. at 1954. As shown in the petition at 6-11, 23-25, the "strong inference" standard, as applied in the Second Circuit, is nothing if not an "elevated standard." Because this case was decided below under an incorrect "elevated standard," certiorari is appropriate.

The Second Circuit continues to apply the "strong inference" standard outside the bounds of the PSLRA, even after *Iqbal*. *See Wood ex rel. United States v. Applied Research Assocs., Inc.*, No. 08-3799-cv, 2009 WL 2143829 (2d Cir. July 16, 2009) (applying "strong inference" standard to claims under False Claims Act). This Court should grant certiorari to put a halt to this erroneous practice in the Second Circuit and to clarify that the Second Circuit's pleading standard is inconsistent with *Iqbal*.

C. Plaintiffs/Petitioners Properly Raised and Preserved the Rule 9(b) Issue Below.

Defendants argue that Plaintiffs failed to preserve the Rule 9(b) issue below by stating the argument in a footnote. *See* Opp. 8; Smith Br. 31 n.13. As an initial matter, Plaintiffs raised their argument in more than

a footnote. In addition to the footnote, Plaintiffs throughout their Second Circuit briefs made arguments such as the following:

- "The Federal Rules of Civil Procedure require only that Plaintiff plead his claims of fraud by alleging facts, not detailed evidence, that give Defendants notice of the claims against them." Smith Br. 27

- "Even under the heightened pleading requirements of Rule 9(b), Plaintiffs are not required to plead with detailed evidence." *Id.* at 32 (internal quotation omitted).

- "'[T]he rule regarding the pleading of fraud does not require absolute particularity or a recital of the evidence ....'". *Id.* (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 (3d ed. 2004)).

- "[M]any cases have held that when presented with claims, such as these, brought by a bankruptcy trustee, the court should 'evaluate averments of fraud more liberally ... than in other civil actions.'" *Id.* (quoting *Amer. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F. Supp. 2d 79, 106 (S.D.N.Y. 2004)); *see also id.* at 32 n.14.

- "[T]he notice pleading principle embodied in the Federal Rules of Civil Procedure does not require the pleading of evidence ...." *Id.* at 37 n.16.

Defendants' suggestion that Plaintiffs made their argument only in a footnote is therefore incorrect. The fact that Defendants found it necessary to address the issue at length in their briefs below shows that the question *was* properly raised. *See* Brief for Defendants-Appellees Deloitte & Touche LLP and Deloitte & Touche USA LLP at 19-21, 309 F. App'x 536 (2d Cir. filed Mar. 3, 2008) ("Deloitte-USA Br.").

Nevertheless, Plaintiffs were entirely justified in focusing their arguments on how the facts alleged in the complaint met the Second Circuit's interpretation of the Rule 9(b) standard. As Defendants argued both in the Second Circuit and in their opposition brief to this Court, the "strong inference" standard has been well-settled law, reaffirmed time and again, for at least three decades in the Second Circuit.[4] Where, as here, the rule of decision was provided by binding

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[4] *See* Opp. 8 & n.8; *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) ("Although scienter need not be alleged with great specificity, plaintiffs are still required to plead the factual basis which gives rise to a 'strong inference' of fraudulent intent."); *Beck v. Mfrs. Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987) ("These factual allegations must give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent."); *Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987) ("It is reasonable to require that the plaintiffs specifically plead those events which give rise to a strong inference that the defendants had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." (internal quotation marks omitted); *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 558 (2d Cir. 1979) ("It is reasonable to require that the plaintiffs specifically plead those events which they assert give rise to a strong inference that the defendants had knowledge of the facts contained in paragraph 18 of the complaint or recklessly disregarded their existence.").

precedent from prior panels, a party need not argue that the prior precedent be overruled to preserve the question for the Supreme Court. *See United States v. Williams*, 504 U.S. 36, 44 (1992) ("The dissent would apparently impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent .... That seems to us unreasonable."). Indeed, it would have been "foolish" for Plaintiffs to devote any more words than they did to the argument that Rule 9(b) does not mandate a strong inference standard. *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1583 (9th Cir. 1994). In this respect, this case is similar to *Louisiana-Pacific*, in which the court held that a party did not waive an argument by failing to raise it when, at the time of the appellate briefing, the pertinent legal issue was settled by controlling authority:

> The plaintiffs filed timely notices of appeal from the district court's dismissal of their MTCA claims, but when the propriety of the district court's ruling was confirmed by the Washington Supreme Court in *Bird-Johnson*, they did not challenge the district court's ruling in their appellate briefs. At the time it would have been foolish for them to do so.

Id. Such principle should apply *a fortiori* here, where the circuit precedent had been affirmed and relied upon for decades by the circuit court.[5]

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[5] It is not true that Plaintiffs "argued in their Second Circuit briefs that the court *should* apply the 'strong inference' standard as explained in *Tellabs*." Opp. 7-8. Rather, Plaintiffs' argument

Even assuming, *arguendo*, that Plaintiffs raised their argument only in a footnote and the issue were not controlled by binding precedent, Plaintiffs' footnote was sufficient to raise the issue because it "contains the appellant's contentions as well as citations to authorities."[6] *Williams v. Woodford*, 384 F.3d 567, 587 n.5 (9th Cir. 2004); *see also Goeke v. Branch*, 514 U.S. 115, 117-18 (1995) (holding single sentence in appellate brief and discussion at oral argument was sufficient to preserve issue).

II. PLAINTIFFS/PETITIONERS' SECOND QUESTION PRESENTED REGARDING WHAT DOCUMENTS MAY BE CONSIDERED ON A MOTION TO DISMISS AND FOR WHAT PURPOSES IS APPROPRIATE FOR CONSIDERATION UNDER A GRANT OF CERTIORARI.

A. The Question Was Properly Raised and Preserved Below.

Defendants argue that Plaintiffs have failed to preserve their second issue regarding what documents may properly be considered on a motion to dismiss and

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in the Second Circuit was that the standard, if applied at all, should be applied more generously than was done in the district court and that the facts alleged in Plaintiffs' pleadings meet that standard. *See* Brief and Special Appendix for Plaintiff-Appellant Gerald K. Smith at 30-31, 34-50, 309 F. App'x 536 (2d Cir. filed Feb. 1, 2008) ("Smith Br."). Plaintiffs never conceded the broader issue whether the "strong inference" standard should apply.

[6] Citations to the record would be unnecessary here because this is a purely legal issue.

for what purposes. Their argument is frivolous. Plaintiffs devoted more than a full page to establishing the legal standard in their brief in the court of appeals, with appropriate citations to authority. *See* Smith Br. 32-34 & n.15. Plaintiffs then applied the standard to the facts of the case. *See id.* at 34, 37, 41-42, 44-46. Deloitte-USA obviously recognized that Plaintiffs properly raised the issue because they addressed it in their opposition brief. *See* Deloitte-USA Br. 29 & n.13. In their reply brief, Plaintiffs expanded upon the argument in rebuttal to Deloitte-USA. *See* Reply Brief for Plaintiff-Appellant Gerald K. Smith at 10-12, 309 F. App'x 536 (2d Cir. filed Apr. 3, 2008). The argument that Plaintiffs did not raise the issue below is, again, incorrect.

The fact that Plaintiffs have now further developed their arguments in their petition for certiorari – where the issues are necessarily more focused – is not remarkable, nor does it mean that Plaintiffs have waived these arguments: "It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That ... does not imply that petitioner failed to preserve the issue raised in its petition for certiorari." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988).[7] Where, as here, a claim was preserved below, a party may make any arguments in support of that

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[7] *See also*, *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.9 (1982) ("[A]lthough neither the opinion of the Court of Criminal Appeals nor Eddings' petition for certiorari spoke to our decision in *Lockett* by name, the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us. Our jurisdiction does not depend on citation to book and verse.").

claim: "Once a federal claim is properly presented, a party can make any argument in support of that claim; *parties are not limited to the precise arguments they made below*." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). Further, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

Even if it were assumed, *arguendo*, that either of Plaintiffs' questions presented were not adequately briefed below, this is no jurisdictional bar to a grant of certiorari. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so."). This Court has been particularly willing to grant certiorari in such instances where, as here, the questions are "likely to recur." *Praprotnik*, 485 U.S. at 121; *see also, e.g.*, *Carlson*, 446 U.S. at 17.

B. The Lower Courts Applied Incorrect Standards in Determining What Documents May Be Considered on a Motion to Dismiss and for What Purposes.

Finally, Defendants argue that certiorari would be improper on the second question because the district court's error was merely "'the misapplication of a properly stated rule of law.'" Opp. 9 (quoting Sup. Ct. R. 10). The district court did correctly state that it may not rely on documents for their truth. *See* Pet. App. 61a n.123. But the district court's disregard for this rule was so blatant that it cannot be considered

merely an improper application of a correct principle. *See* Pet. 36-38.

Furthermore, the consideration of certain documents *for their truth* was not the district court's only error. The district court also erred in considering these documents *at all*. Plaintiffs' petition provides several reasons why it was improper for the district court to consider these documents. *See* Pet. 31-35. Defendants do not suggest that the district court recited the proper standard with respect to these issues.

Respectfully Submitted,

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